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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JIN GUAN,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT
INSURANCE APPEALS BOARD,

Defendant and Respondent;

EAST LION CORPORATION,

Real Party in Interest.

B279505

(Los Angeles County
Super. Ct. No. BS158776)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Law Offices of Ray Hsu and Ray Hsu for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Jennifer M. Kim and Chara L.

Crane, Deputy Attorneys General, for Defendant and Respondent.

Friedman Stroffe & Gerard, Robert Gerard and Sally Costanzo for Real Party in Interest.

The California Unemployment Insurance Appeals Board (the Appeals Board) ruled that Jin Guan (Guan) was ineligible for unemployment compensation benefits after finding that she was terminated from employment by real party in interest East Lion Corporation (East Lion) for misconduct. (Unemp. Ins. Code, § 1256.)¹ Guan petitioned the trial court for a writ of administrative mandamus seeking to overturn the denial. In her appeal from the ensuing judgment denying her petition, she contends the evidence does not support the finding that she committed misconduct; rather she was unlawfully discharged by East Lion in retaliation for reporting sexual harassment and illegal company conduct. We hold that the trial court's findings are supported by substantial evidence and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Guan's discharge from employment

Guan worked in East Lion's accounts receivable for approximately 12 years. East Lion terminated her employment on April 2, 2015, after she sent a company-wide email accusing her immediate supervisor Julia Chu (Chu) of sexually harassing her, and alleging that the company violated immigration visa laws and bribed city officials.

¹ All further statutory references are to the Unemployment Insurance Code unless otherwise indicated.

II. The Employment Development Department's decision

Guan applied for unemployment compensation benefits. After interviewing Guan and Chu, the Employment Development Department (EDD) denied the application. It found that East Lion fired Guan for refusing to follow reasonable directions, with the result she was disqualified from receiving benefits under section 1256.

III. The Appeals Board's decision

Claiming that she was terminated from employment for reporting workplace harassment and illegal conduct, Guan filed her appeal. In it, she asserted she “never ever refused to follow reasonable company directions.”

At the hearing before an administrative law judge (ALJ), Chu testified that she is an accounting manager at East Lion and was Guan's supervisor. Chu noticed in the last two years that Guan's attitude had changed and she refused to complete assignments. Chu spoke to Guan and issued her a written warning. Guan continued to be rude and reject certain assignments. Chu testified that Guan also took unapproved time off in excess of her allotted vacation and sick days. In early October 2014, Chu gave Guan a written warning of having too many absences and a problem with tardiness. Guan submitted written objections to that warning. Guan's year-end performance review in 2014 further reflected her tardiness and insubordination. Guan wrote a two-page rebuttal to that review.

In early 2015, Chu asked Guan to perform a credit card reconciliation. Over two months, Guan repeatedly refused to perform the task despite Chu's offers to show her how. Finally, Chu did the work herself and asked Guan to fix several errors in the account. Guan again refused. Chu gave Guan her second

written employee warning-notice on March 30, 2015 stating that Guan's work habits and insubordination had worsened. When Guan refused to sign the second warning, Chu decided to terminate Guan's employment for insubordination and refusing to follow simple directions. Chu gave Guan a letter of termination.

Guan took the letter to East Lion's Vice President Julia Kuo (Kuo) to complain. Guan told Kuo that Chu was treating her unfairly. Guan had complained to Kuo many times before. Kuo had also heard from Chu and perceived the problem to be one of conflicting personalities. Kuo told Guan that she had to respect the fact that Chu was a manager and that Guan should not argue with Chu in front of the entire department. As a solution, Kuo agreed to rescind the termination *on the condition* that Guan respect the fact that Chu was her manager. But, Kuo warned, if Guan continued to be insubordinate, "that it wasn't going to work." Tellingly, Guan did not agree to the condition at first. The two went "back and forth" in Kuo's office until 8:00 p.m. or 9:00 p.m. By the end of the meeting, Guan decided to stay with the company. But, as Kuo was driving home, she learned that Guan had changed her mind again. Kuo testified, "while I was on the road I told [Guan] you need to make up your mind. . . . Do you want to stay or not stay?" Before ending the conversation, Guan said she wanted to remain with East Lion.

At 1:00 a.m. on April 1, 2015, Guan sent an email to Kuo and East Lion's president about her termination. Although she claimed that Chu, "without reason, plotted 2 warnings and now demand[s] termination," and while she mentioned Chu's "tyrannical demands," Guan's email never mentioned sexual harassment or illegal company conduct. Kuo replied by assuring

Guan that East Lion would like her to return and reiterating the above condition. Guan decided to remain with the company and asked for a day off.

Guan returned to work on April 2, 2015 and promptly told Kuo that she would comply with the condition.

At 3:28 p.m. that same day, Guan sent an email to the entire company of around 56 employees, accusing East Lion of illegal conduct with respect to H1B visas and bribing city employees, and accusing Chu of sexually harassing her. When Kuo saw the email, she went to Guan's office to find Guan packed and ready to leave.

Kuo explained that company policy encourages employees to report issues to management, but does not require such reports be made only to management. Kuo felt strongly that Guan would have brought the allegations to her attention earlier if they were true. Kuo reasoned that Guan felt comfortable bringing complaints to her, and had had many opportunities to report any harassment earlier. Yet, Guan never mentioned sexual harassment or illegal activity to Kuo before sending the April 2, 2015 email. After the firing, Kuo spoke to all of the employees in the accounting department about the relationship between Guan and Chu. She took notes, but did not write a formal report. Kuo did not investigate the allegations of bribery and illegal conduct concerning immigration visas because she knew they were false.

Guan testified that Chu talked to Guan about Chu's sex life with her boyfriend. Guan claimed she "rejected [this] . . . harassment" two years earlier. Guan sent the April 2, 2015 email to "formally bring up this issue and ask the company to investigate regarding the sexual harassment issue." She believed it was "necessary for all to know. . . . I was the only one

being punished.” Guan believed that her email was consistent with her agreement to respect Chu and management. Because Kuo told her to resolve her problems with Chu on her own, she lost confidence in Kuo’s willingness to help her. Guan felt she needed to let everyone at East Lion know about her problem with Chu so that the company would step up and solve it. Guan denied packing her belongings before Kuo fired her.

The ALJ upheld the EDD’s denial of benefits. In its written decision, the ALJ found that Guan sent the email to cause dissension at work and to embarrass Chu and Kuo. Therefore, sending the email was an act of defiance and insubordination that constituted willful misconduct under section 1256. The ALJ found that Guan did not honestly believe the charges of sexual harassment and illegal company conduct. The ALJ inferred that the email was not a sincere report, but instead an act of defiance made in an attempt to save face with co-workers. Finally, the ALJ concluded that sending the email to the entire company rather than just to management further undermined Guan’s claims that the allegations were legitimate.

Guan sought review by the full panel of the Appeals Board. A panel carefully and independently reviewed the record and considered Guan’s contentions. The Appeals Board upheld the factual findings, with one typographical correction, and ruled that the decision properly applied the law to the facts. The Appeals Board rejected Guan’s contention that her email was whistleblowing activity protected by Labor Code section 1102.5, subdivisions (b) and (c), and the Fair Employment and Housing Act (Gov. Code, § 12940, subd. (h)) (FEHA). Instead, the panel agreed with the ALJ that the email was a public airing of a

dispute, intended to embarrass Guan's supervisor and the company.

IV. Guan's petition for writ of mandamus

Guan's operative writ petition alleged that the Appeals Board abused its discretion when it agreed with the ALJ that her April 2, 2015 email was insincere. She argued that she was not terminated for misconduct as defined by section 1256, but for protesting sexual harassment and illegal conduct, which are activities protected by the Labor Code and FEHA. Therefore, she contended, she was entitled to unemployment compensation benefits.

The trial court reviewed the administrative record. It rejected Guan's sufficiency of the evidence contention, finding instead that the weight of the evidence supported the Appeals Board's conclusion that the April 2, 2015 email constituted misconduct that disqualified Guan from receiving benefits.

The court found that Guan's report of illegal activity was insincere, and disbelieved Guan that her email was a genuine attempt at whistleblowing. It considered the parties' relationship: Chu and Guan had been clashing for two years while keeping Kuo informed. Guan contested each of her negative reviews. In none of her meetings or communications with Kuo did Guan allege sexual harassment, bribery, or illegal conduct. The trial court found it incredible that, under those circumstances, Guan never mentioned illegal activity before. The court was particularly persuaded by the fact that as soon as she sent the email, Guan packed and was ready to leave. The court also disagreed with Guan that sending the allegations company-wide would ensure an investigation, finding the only reason to send the email company-wide was to embarrass Chu and

management. On the evidence, the court found that the email was not a good faith attempt to report illegal activity, but rather an act of insubordination, as it was completely inconsistent with Guan's promise to respect Chu as her supervisor. The court found the email was intentionally designed to cause workplace dissension, humiliate Chu, and embarrass the company in complete disregard of the standards of behavior that East Lion had a right to expect of its employees.

Finally, citing *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1226 (*Joaquin*), the court held the mere fact that Guan alleged sexual harassment and illegal conduct did not turn the email into activity that was protected by FEHA and the Labor Code. Guan's motive in sending the email was "dispositive." The court entered judgment denying Guan's petition for writ of mandate and Guan filed her timely appeal.

DISCUSSION

I. The standard of review

Code of Civil Procedure section 1094.5 prescribes the procedures for judicial review of adjudicatory decisions made by administrative agencies. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) When reviewing decisions of the Appeals Board on a petition for writ of mandamus, the trial court " " "exercises its independent judgment on the evidentiary record of the administrative proceedings and inquires whether the findings of the administrative agency are supported by the weight of the evidence." ' ' ' (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 562 (*Paratransit*).)

On appeal, we “determine[] whether the independent ‘findings and judgment of the [superior] court are supported by substantial, credible and competent evidence’ in the administrative record. [Citations.] ‘[A]ll conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court’s findings; moreover, when two or more inferences can be reasonably deduced from the facts, the appellate court may not substitute its deductions for those of the superior court.’ [Citation.] However, the appellate court may disregard the superior court’s conclusions when the probative facts are undisputed and clearly require different conclusions. [Citations.] ‘ “Appellate review in such a case is based not upon the substantial evidence rule, but upon the independent judgment rule.” ’ ” (*Paratransit, supra*, 59 Cal.4th at p. 562.) In short, our review is virtually identical to that in court-tried litigation. (*Rabago v. Unemployment Ins. Appeals Bd.* (1978) 84 Cal.App.3d 200, 206.)

II. The law of unemployment compensation

“The fundamental purpose of [the] Unemployment Insurance Code is to reduce the hardship of unemployment by ‘providing benefits for persons unemployed *through no fault of their own.*’ ” (*Paratransit, supra*, 59 Cal.4th at p. 558, italics added.) Accordingly, “ “fault is the basic element to be considered . . . ” ’ when ‘interpreting and applying’ the provisions of the code.” (*Ibid.*)

Section 1256² makes an individual ineligible for unemployment compensation benefits when he or she is found to have “been discharged for *misconduct* connected with his or her most recent work.” (Italics added.) The meaning of “‘misconduct’ ” as used in section 1256 is well settled. (*Drysdale v. Department of Human Resources Development* (1978) 77 Cal.App.3d 345, 352.) It is “limited to ‘conduct evincing such willful or wanton disregard of an employer’s interests as is found *in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee*, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. [In contrast], mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.” ’ ” (*Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 678, italics added.) “This means that, even when an employee’s conduct is harmful to the employer’s interests and justifies the employee’s discharge, such conduct will warrant

² Section 1256 reads in relevant part, “An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily *without good cause* or that he or she has been *discharged for misconduct* connected with his or her most recent work. [¶] An individual is presumed to have been discharged for reasons other than misconduct The presumption provided by this section is rebuttable.” (Italics added.)

“disqualification for unemployment insurance benefits *only if it is willful, wanton or equally culpable.*” ’ ’ (Paratransit, supra, 59 Cal.4th at p. 559.)

“To establish misconduct, there must be ‘substantial evidence of deliberate, willful, and intentional disobedience’ on the part of the employee. [Citation.] Determinations regarding an employee’s intent ‘ “must take account of ‘ “real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.” ’ ’ ’ [Citation.] This standard is both subjective and objective, and depends on the totality of the circumstances surrounding the employee and the alleged misconduct. [Citation.] Thus, while the inquiry ‘ “tends to place emphasis upon the subjective motives and attitudes of the employee rather than upon objective standards, . . . one cannot determine whether an employee’s action is misconduct within the humanitarian purpose of the unemployment compensation statutes without judging the reasonableness of his act from his standpoint in the light of the circumstances facing him and the knowledge possessed by him at the time.” ’ ’ (Paratransit, supra, 59 Cal.4th at p. 559, italics omitted.)

III. Substantial evidence supports the trial court’s finding that the April 2, 2015 email constituted deliberate misconduct and not sincere charges of sexual harassment or illegal company activities.

Guan contends that the evidence does not support the finding that she engaged in misconduct because she was terminated in retaliation for whistleblowing.

Guan's intent and motive in sending the email are questions of fact for the trial court, not the appellate court, to resolve. (See *Paratransit, supra*, 59 Cal.4th at p. 559.) The trial court reviewed the evidence, which was disputed, and found Guan's claims incredible and did not believe that her report of sexual harassment and illegal company activity was a genuine attempt to whistleblow. We do not reassess credibility. (*San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292.)

Apart from the credibility finding, substantial evidence supports the trial court's findings that the email was an act of misconduct and not of whistleblowing. Guan clearly did not get along with her supervisor and she had been insubordinate for two years. She received two warnings and a negative performance review. She objected each time and frequently complained to Kuo. Although Guan had no compunction about refusing to perform tasks as requested and felt very comfortable complaining to management, and notwithstanding her assertion the sexual harassment had been ongoing for two years, Guan never mentioned sexual harassment or illegal company activity until immediately after she was discharged for insubordination. This evidence amply supports the trial court's finding that the email was not a sincere attempt at whistleblowing but an act of misconduct designed to create workplace dissention and embarrass Chu and Kuo.

Furthermore, Guan's attitude speaks volumes about her motives. She vacillated on whether she would accept her employer's condition that she respect Chu's managerial authority in order to keep her job. She and Kuo discussed that issue for hours at work, on the telephone, and by email. After taking a

day off, on April 2, 2015, Guan finally accepted the condition. Thus, she knew full well that she could be discharged again if she violated it. Then, just hours after returning to work from her original discharge, Guan sent the offending email to the entire company, and immediately packed her belongings.³ Accordingly, the record clearly supports the trial court's finding that Guan deliberately defied standards of behavior which East Lion had the right to expect of her. She knew she intentionally breached her promise to comply with the condition of re-employment and that she would be discharged again for it.

Finally, although East Lion had no fixed procedures for making complaints of workplace harassment and illegal activity, and merely encouraged employees to bring such complaints to management, there was no reason to send the April 2, 2015 email to every non-management employee, other than to cause dissension and embarrass Chu and Kuo. The trial court did not believe Guan's justification for sending the email company-wide, namely that she not trust that Kuo would listen to her complaints. The court noted that the excuse did not bear the test of reason. (See *Paratransit, supra*, 59 Cal.4th at p. 559.) Kuo had just listened to Guan's complaints about Chu for hours, going so far as to rescind Chu's decision to terminate her. The April 2, 2015 email was not genuinely intended to trigger a company investigation. Guan testified she sent it because she wanted "all to know. . . . I was the only one being punished." The record overwhelmingly supports the trial court's findings that Guan's April 2, 2015 allegations were untrue and that her motive for

³ Although Guan denies this, the trial court believed Kuo's testimony, and we do not assess credibility. (*San Diego Gas & Electric Co. v. Schmidt, supra*, 228 Cal.App.4th at p. 1292.)

sending the email was objectively and subjectively insincere and in bad faith, with the result that her actions constituted willful and intended disobedience and defiance of promises she had just made to Kuo, and was designed to embarrass Chu and the company. Therefore, the court's conclusion that East Lion terminated Guan from employment for misconduct as that term is used in section 1256 was abundantly supported by the record.

IV. Guan's contentions are unpersuasive

A. *The totality of the circumstances*

Guan contends that the trial court erred in finding her prior disputes with Chu were *material* to the question of misconduct. She adds that the court should not have considered her indecision about whether to accept the condition of re-employment when assessing her motivations for sending the email.

This argument appears to have been taken from the ALJ's conclusion that whatever misconduct Guan engaged in before April 1, 2015 was forgiven when Kuo rescinded her termination. But, the trial court does not follow the findings or rulings of the ALJ; it conducts its own limited trial de novo, and exercises its independent judgment on the evidence in the administrative record. (Code Civ. Proc., § 1094.5, subd. (c); *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 841.) As Guan acknowledges, in conducting its limited de novo trial, the court considers the *totality of the circumstances* surrounding the employee and the misconduct, not isolated moments. (*Paratransit, supra*, 59 Cal.4th at p. 559.) Finally, Guan's relationship with Chu was indeed material to the court's finding

that Guan engaged in misconduct. It was relevant to her attitude and motive. (Evid. Code, § 210.)

B. *Timing*

Guan contends that the trial court erred in finding misconduct based on the timing of her email. Noting that she sent the email within the three-year statute of limitations for reporting illegal workplace conduct, Guan argues that it “is arbitrary to claim that [she] lacked good faith simply because [she] did not protest immediately to her supervisor’s sexual harassment.” She argues she “should not be punished and denied unemployment benefits due to waiting to report a claim because [she] was well within her statutory rights to protest and file a complaint against her employer.”

There was nothing arbitrary about the trial court’s conclusions. The court could reasonably find it incredible that an employee, especially one with Guan’s history of complaining to management about her supervisor, would hold silent about allegations as serious as sexual harassment and illegal company conduct. These timing-related facts undermined the sincerity of Guan’s allegations and motives. And, the court could reasonably infer bad faith from the speed with which Guan issued her email upon returning from her original termination. Having her belongings packed by the time she was confronted by Kuo further demonstrates the likelihood that the email was not intended to be the impetus of an investigation but instead a parting shot. As the court explained, Guan’s right to wait three years to make a report of illegal activity did not mean her credibility could not be challenged. The sincerity finding was a factual question based on credibility, not on the statute of limitations for bringing Labor Code and FEHA claims.

C. *FEHA and Labor Code section 1102.5, subdivisions (b) and (c)*

Finally, Guan contends that protesting workplace sexual harassment and company illegal conduct was protected activity under FEHA and the Labor Code that insulated her from retaliation by East Lion. She argues the trial court's finding that she engaged in misconduct contradicts California public policy because denying her benefits rewards the employer for retaliating, while punishing her for not reporting Chu's sexual harassment earlier. The contention assumes that Guan was engaging in whistleblowing *as a matter of law*. But, as already analyzed, substantial evidence supports the trial court's finding that Guan did not engage in protected activity but in misconduct for which she was discharged.

FEHA prohibits employers from retaliating against employees for engaging in protected activity, i.e., for "discharg[ing], expel[ling], or otherwise discriminat[ing] against any person because the person has opposed any practices forbidden under this part." (Gov. Code, § 12940, subd. (h).) But, an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment, if the reason for discipline was the employer's good faith belief that the employee engaged in misconduct, and was not motivated by discriminatory or retaliatory animus. (*Joaquin, supra*, 202 Cal.App.4th at p. 1226.)

The court in *Joaquin, supra*, 202 Cal.App.4th 1207, addressed the legal question "whether an employee may be disciplined if his or her employer concludes that the employee has fabricated a claim of sexual harassment, or whether such a complaint is insulated from discipline even where, as here, the

employer determines that it was fabricated.” (*Id.* at pp. 1221–1222.) The *Joaquin* court held that the employer is entitled to rely on its good faith belief about the falsity of the employee’s allegations of sexual harassment when terminating an employee for lying. (*Id.* at p. 1225.)

Joaquin, supra, 202 Cal.App.4th at pages 1225 to 1226 quoted from a case where the employee was fired for lying during an investigation into discrimination: “ ‘[I]t “cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact.” [Citation.] . . . “[The antidiscrimination laws were] not designed to ‘arm employees with a tactical coercive weapon’ under which employees can make baseless claims simply to ‘advance their own retaliatory motives and strategies.’ . . . Were we to adopt a different standard, an employee could immunize his unreasonable and malicious internal complaints simply by filing a discrimination complaint with a government agency. Similarly, an employee could assure himself unlimited tenure by filing continuous complaints with the government agency if he fears that his employer will discover his duplicitous behavior at the workplace. . . . If we were to adopt [plaintiff’s] arguments, it would encourage the abuse of [the antidiscrimination laws] and the proceedings that [they] established.” ’ ”

Guan has apparently brought a separate civil action against East Lion for violation of FEHA and the Labor Code. We decline to address whether she might be able to demonstrate in

that case that her discharge was motivated by retaliatory animus in violation of FEHA and Labor Code section 1102.5. Our focus is on the evidence that supported the trial court's finding Guan engaged in misconduct as that term is used in section 1256. Kuo investigated Guan's sexual harassment allegation, albeit after the termination, and she testified that she knew the allegations of bribery and illegal visa activity were false. The trial court effectively credited Kuo's testimony and disbelieved Guan. The court found that Guan doubted the truth of her email's allegations and that her motive for sending the email was to embarrass Chu and management and to create dissension, not to whistleblow. Otherwise, the court would not have found that Guan engaged in misconduct disqualifying her for employment compensation benefits. Guan cannot send a last-minute email in an act of intentional and deliberate misconduct and insulate herself from the repercussions at the EDD by including fabricated allegations of sexual harassment and company illegal acts. Stated otherwise, the question under the Unemployment Insurance Code is not whether Guan should have been fired, that is a question for another court, but whether, now that she has been fired, she is entitled to unemployment compensation benefits. She is not.

DISPOSITION

The judgment is affirmed. California Unemployment Insurance Appeals Board and East Lion Corporation are awarded their costs of appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.